

SEP 22 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A04-90949-PWB
	:	
CHC-VENTURE PROPERTIES, LLC,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
<hr/>		
JORDAN E. LUBIN, as Trustee in	:	
Bankruptcy of the Estate of	:	
CHC-Venture Properties, LLC,	:	
	:	
Plaintiff	:	ADVERSARY PROCEEDING
	:	NO. 04-6469
v.	:	
	:	
ROBERT P. GUYTON,	:	
	:	
Defendant.	:	

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Trustee for CHC-Ventures Properties, LLC, seeks entry of partial summary judgment on his claim that the Defendant breached an agreement to purchase property of the estate located at 320 Wilderlake Court, Atlanta, Georgia (the "Property"). The Defendant contends that the Trustee's failure to provide notice of the Bankruptcy Court's approval of the sale constituted a material breach of the agreement that relieved him of any obligation to perform under the agreement. For the reasons stated herein, the Court denies the motion for partial summary judgment and schedules this matter for a pre-trial conference.

On June 8, 2004, the Trustee and the Defendant executed the Trustee's Purchase and Sale Agreement (the "Agreement") for the "as is, where is" sale of the Property to the Defendant

for a purchase price of \$6,500,000.00.¹ The Agreement contains the following language regarding the closing of the purchase and sale:

5. Closing. The closing of the purchase and sale of the Property, hereinafter called "Closing," shall take place no later than June 30, 2004, subject to Bankruptcy Court approval of the sale as provided in paragraph 31 [sic]² hereof, herein called "Closing Date," at the offices of Seller located at Suite 2800 One Atlantic Center, 1201 West Peachtree Street, Atlanta, Georgia 30309-3450, or at such other place as Seller and Purchaser may mutually agree upon. Seller agrees to give Purchaser notice of the Bankruptcy Court approval within two (2) days of such approval . . .

The Agreement provides that it is subject to and contingent upon the approval of the Bankruptcy Court authorizing the sale of the Property free and clear in accordance with the terms of the Agreement. Further, the Agreement provides, "In the event the Bankruptcy Court fails to approve this Agreement on or prior to June 30, 2004, Purchaser may by notice to Seller terminate this Agreement, whereupon any Earnest Money shall be promptly refunded to Purchaser except as provided hereinabove with respect to a Purchaser's default and this Agreement shall become null and void and the parties shall be relieved of and released from any and all further rights, duties, obligations and liabilities hereunder." (Agreement, ¶ 30).

After notice and hearing, on June 23, 2004, the Court entered an Order granting the Trustee's motion to sell the Property free and clear of liens pursuant to 11 U.S.C. § 363(b) and (f).

¹The Agreement is attached as Exhibit A to the Trustee's Complaint filed August 19, 2004.

²The provision regarding Bankruptcy Court approval is contained in paragraph 30, not 31, of the Agreement.

On June 26, 2006, the Defendant wrote to the Trustee seeking an extension of the closing until July 30, 2004, to conduct "due diligence" as a result of telephone calls received by a third party regarding the Property. (Plaintiff's Statement of Material Facts, Exhibit E, filed January 20, 2006). On June 29, 2004, the Trustee through counsel rejected an extension. (Plaintiff's Statement of Material Facts, Exhibit F). No closing occurred on June 30. In a letter dated August 10, 2004, the Defendant's counsel, John Pennington, notified the Trustee's counsel that the Defendant "no longer wishes to proceed with the transaction." (Plaintiff's Complaint, Exhibit D). The letter continued by stating the belief that the Defendant could "exercise the option of not proceeding with the transaction without incurring liability under [the Agreement]." *Id.*

The essential elements of a valid contract are "parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. § 13-3-1. In order to be enforceable, a contract "must be expressed plainly and explicitly enough to show what the parties agree upon and no question exists about the parties' obligations." *Southern Prestige Homes, Inc. v. Moscoso*, 243 Ga. App. 412, 415 532 S.E.2d 122, 125 (2000). Neither party disputes that the Agreement was a valid contract. The issue is whether either party breached the Agreement and, if so, what remedy, if any, is available.

The Trustee contends that the Defendant breached the Agreement by failing to close the sale and seeks partial summary judgment on this issue, with damages to be determined at a later evidentiary hearing. In response, the Defendant contends that there was no breach because he was relieved of performance due to the Trustee's failure to provide notice of the Bankruptcy Court's approval of the sale pursuant to paragraph 5 of the Agreement. Unless the Trustee's failure to provide notice excused the Defendant's failure to perform under the Agreement, there is no dispute

that the Defendant failed to perform his duties under a valid contract for the sale of real property when he failed to proceed to closing on the sale. However, if the Trustee breached the Agreement by failing to provide notice of the Bankruptcy Court's approval of the sale, the Defendant may have a basis for failing to perform.

Whether the Defendant was excused from performance depends on whether the Trustee's alleged failure to provide notice under ¶ 5 constituted a material breach of the Agreement. Not all breaches of contract excuse the other party to the contract from future performance. If a breach is "relatively minor and not of the essence," the parties remain obligated by the terms of the contract. 23 WILLISTON ON CONTRACTS § 63:3 (4th ed.); see *Mayor and City of Douglasville v. Hildebrand*, 175 Ga.App. 434, 333 S.E.2d 674 (1985). Thus, the focus is on whether a party has committed a "material" breach of the contract such that it is a "failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *Id.*

The Defendant contends that the notice provision was material to the transaction (Defendant's Statement of Material Facts, ¶ 4, attached to Defendant's Response to Motion for Summary Judgment). In support, the Defendant relies on the case of *Allen v. McKool*, 180 Ga.App. 622, 349 S.E.2d 833 (1986), *aff'd*, 377 S.E.2d 162 (1989). In *Allen*, the parties entered into a contract for the sale of real estate, contingent upon rezoning of the property that the purchaser was to pursue. If the purchaser was successful, the closing was to occur no later than June 23, 1984. The contract required the purchaser to give the seller written notice of the time of closing at least 3 days prior to the closing date and provided that if the purchaser breached the contract, the seller would receive the earnest money as liquidated damages. On June 21, the purchaser sent written notice that the closing would take place on June 22. When the seller failed to appear, the purchaser

sent notice of a closing on June 23. On June 22, the seller notified the purchaser that he did not intend to close the transaction. The purchaser sued for specific performance of the contract and damages. The trial court granted summary judgment in favor of the seller, and denied partial summary judgment to the purchaser.

On appeal, the seller contended that the trial court erred in denying his motion for summary judgment because he substantially performed his obligations under the contract with regard to notice. The appeals court affirmed the trial court on this issue, stating that the purchaser drafted the contract and included the notice provision and “cannot deny its materiality simply because he failed to meet its requirement.” *Allen*, 180 Ga.App. at 624, 349 S.E.2d at 834.

The court, however, reversed the award of summary judgment to the seller, because there was an issue of material fact as to whether the seller had *waived* the purchaser’s breach. The court reviewed the record and found that the seller knew the purchaser had breached the notice requirement when he notified him by telephone that he would not go through with the closing. According to the seller’s attorney’s affidavit, the seller’s stated reason was that he thought the contract required the parties to close on or before May 24. The purchaser’s attorney’s affidavit said that the seller claimed a breach of contract excused him from closing the sale. The appeals court noted that “it appears that the first time [the seller] raised the breach of notice issue was after suit was filed against him.” *Allen*, 180 Ga.App. at 624, 349 S.E.2d at 834. As a result, because it was “not clear from the evidence whether or not [the seller], by his conduct, waived his right to object to [the purchaser’s] breach,” summary judgment in favor of the seller was inappropriate. *Id.*

Thus, *Allen* makes two points relevant to this case. First, a notice provision may be material to a contract and failure to abide by it may constitute a breach. Second, a party can waive another party’s breach by his own conduct. Both points preclude summary judgment for either the

Trustee or the Defendant.

Based on the current record, the Court cannot find that the notice provision is a material provision of the Agreement. Whether the notice provision was material such that it was so “fundamental that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract,” WILLISTON, *supra*, is a mixed issue of fact and law that has not been addressed by the Trustee, nor has it been established by the Defendant.

Further, even if the notice provision is material, there is a question of fact as to whether the Defendant waived the alleged breach by requesting an extension of the closing. By letter dated June 26, 2004, the Defendant requested an extension of time to close on the Property in light of allegations made by a third party, Fred Filsoof, regarding the Property. In particular, the Defendant wrote (Plaintiff’s Statement of Material Facts, Exhibit E):

If I am to proceed with this purchase, I need to fully understand whom, Fred Philsueth [sic] is, why he is calling me with these allegations and what if any liability I’m assuming with this purchase. In addition, I need to diligence [sic] these new, material issues involving the core value of the house.

In order to inspect the house more fully and to get validation on the survey with respect to the original purchase versus the land included in this sale, I need and am requesting an extension until the sooner to occur of completing this work and July 30, 2004.

Then, in a letter dated August 10, 2004, the Defendant’s attorney wrote to the Trustee’s attorney as follows (Complaint, Exhibit D):

I have been employed to represent [the Defendant]. [The Defendant] has presented to me a copy of "Trustee's Purchase and Sale Agreement" entered into on or about June 8, 2004 between [the Defendant] and the Trustee. [The Defendant] has advised me that he no longer wishes to proceed with the transaction. My review of the document indicates that he can exercise the option of not proceeding with the transaction without incurring liability under the document. It appears under the document that damages are restricted to the amount of the escrow deposit and I am informed that such amount was zero.

The first reference in the Court's record to the Defendant's alleged lack of notice is in his September 20, 2004 answer to the Trustee's Complaint. Thus, there is a question of fact as to whether the Defendant, like the seller in *Allen*, by his conduct waived the alleged breach of the Agreement.

Because there are material facts in dispute, the Court must deny the motion for summary judgment and will schedule this matter for a pre-trial conference at which time the parties shall identify the issues to be tried (if any) in addition to the following:

1. Whether the Trustee provided notice to the Defendant pursuant to ¶ 5 of the Agreement;
2. If no notice was provided, whether the failure to provide notice constituted a breach of the Agreement that excused the Defendant's future performance;
3. If the failure to provide notice was a material breach, whether the Defendant, by his conduct;
4. If the Defendant breached the Agreement, whether the Trustee is entitled to damages;

and

5. If the Trustee is entitled to damages, their amount.

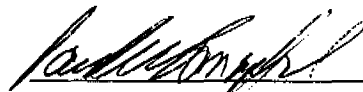
Accordingly, it is

ORDERED that the Trustee's motion for partial summary judgment is denied. It is

FURTHER ORDERED AND NOTICE IS HEREBY GIVEN that the Court shall hold a pre-trial conference on October 17, 2006, at 2:00 p.m., in Courtroom 1401, U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this 21 day of September, 2006.



PAUL W. BONAPFEL

UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

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